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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-163

RAY LEONARD ADKINS,

Petitioner,

v.

KELLY'S CREEK RAILROAD COMPANY,

a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RUDOLPH L. DITRAPANO
604 Virginia Street E.
Charleston, West Virginia 25301

ROBERT M. HARVEY
1256 West Virginia Avenue
Dunbar, West Virginia 25064

Dunbar Printing Co., Dunbar, W. Va.

INDEX
TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
FEDERAL CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6

A. The Fourth Circuit's Ruling Sustaining Summary Dismissal of the F.E.L.A. Count from the Complaint Denies Adkins the Right to Trial by Jury Contrary to the Congressional Purpose of the Enactment; Contrary to Previous Decisions of this Court; and, Contrary to the 7th Amendment to the United States Constitution.

B. The District Court and the Fourth Circuit Misconstrued the Decisional Law of West Virginia in the Case of *Beall* v. *Morgantown & Kingwood Railroad Company*, 118 W. Va. 289, 190 S. E. 333 (1937).

C. In Contrast with Decisions of Other Federal Courts the Federal Courts Here Weighed and Considered the Evidence and Ignored the Jury Verdicts in Granting Kelly's Creek's Motion for Motion n.o.v.

CONCLUSION	12

TABLE OF CASES

	Page
Bailey v. *Central Vermont Railway, Inc.* 319 U. S. 350 (1943)	6
Baker v. *Texas & Pacific Railway Company,* 359 U. S. 227 (1959)	7
Beall v. *Morgantown & Kingwood Railroad Company,* 118 W. Va. 289, 190 S.E. 333 (1937)	9
Cratsley v. *Pittsburg and Lake Erie Railroad Company,* 272 F. Supp. 330 (W. D. Pa. 1967)	8
Glus v. *Brooklyn Eastern District Terminal,* 359 U. S. 231 (1959)	7
Harris v. *Pennsylvania Railroad Company,* 361 U. S. 15 (1959)	7
Lavender v. *Kuhn,* 327 U. S. 645 (1946)	7
Montgomery Ward & Company v. *Duncan,* 311 U. S. 243 (1943)	11
Ortiz v. *Greyhound Corp.,* 275 F. 2d 770 (4th Cir. 1960)	11
Ringhiser v. *Chesapeake and Ohio Railway Company,* 354 U. S. 901 (1957)	7
Scarborough v. *Atlantic Coast Line R. Co.,* 190 F. 2d 935 (4th Cir. 1951)	8
Schultz v. *Pennsylvania Railroad Company,* 350 U. S. 523 (1956)	6

CONSTITUTIONAL AND STATUTORY PROVISIONS

7th Amendment, United States Constitution ---- 3
Title 45, U.S.C.A. Section 56. ---------- 3

INDEX TO APPENDIX

Letter Opinion of the District Court of March 1, 1968, Sustaining Summary Judgment of F.E.L.A. Count A- 1

Memorandum Opinion of the District Court of December 3, 1970, Granting Kelly's Creek motion n.o.v. ---------- A- 4

Fourth Circuit Opinion of April 5, 1972, Sustaining District Court. ---------- A-10

Fourth Circuit Order of May 9, 1972, Denying Rehearing. ---------- A-14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No._____

RAY LEONARD ADKINS,
Petitioner,

v.

KELLY'S CREEK RAILROAD COMPANY,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Ray Leonard Adkins, hereinafter referred to as Adkins, prays that a writ of certiorari issue to review (1) the judgment of the United States Court of Appeals for the Fourth Circuit, entered April 5, 1972, in case No. 71-1457, styled *Ray Leonard Adkins, appellant,* v. *Kelly's Creek Railroad Company, a corporation, appellee,* wherein the Fourth Circuit affirmed the judgment of the United States District Court of the Southern District of West Virginia, at Charleston, West Virginia, which held (a) that the issue of whether the time limitation imposed by the Federal Employers Liability Act [herein called FELA] was tolled was a question of law for the court and not a jury question, and (b) that the district court was right in granting a defense motion for judgment notwithstanding the verdict [herein called judgment n.o.v.] on the ground that the evidence showed Adkins had waived his right to maintain the action, and (2) the order of the Fourth Circuit entered May 9, 1972, which denied Adkins' petition for rehearing.

OPINIONS BELOW

The district court's opinions, which appears here in Appendix A at pages (A-1-4), are unreported. The opinion of the Circuit Court appears at page (A-4) and is reported in 458 F 2d 26.

JURISDICTION

The judgment of the Fourth Circuit was entered April 5, 1972. A timely petition for rehearing was denied May 9, 1972, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A.1254 (1).

QUESTIONS PRESENTED

I. Whether it is proper for a trial court in considering a motion for summary judgment made by a defendant employer to a two count complaint (1) in Tort based on the FELA, which count would have been barred by limitations except for allegations in the count that the plaintiff forebare bringing the FELA action because of inducements and representations of the defendant that the plaintiff would always have a lifetime job if he would not bring the action, and (2) a count for breach of the contract of lifetime employment, to sustain a summary dismissal of the FELA count on the ground that the FELA, or Tort count, was merged into the contract count?

II. Whether following jury trial on the contract count and a verdict in favor of the plaintiff, the district court was justified in granting a defense motion n.o.v. on the ground that the plaintiff had waived his right to recover under the contract of lifetime employment by accepting employment with another corporation, when the undisputed evidence shows that the other corporation was the parent corporation of the defendant, that both corporations had the same supervision, with overlapping duties, and the same officers and directors for the most part, and that both corporations were engaged in a common undertaking, and that the plaintiff who had only a fourth grade education, continued to perform the same duties throughout his employment without any change whatsoever?

FEDERAL CONSTITUTIONAL PROVISION AND STATUTORY PROVISION INVOLVED

Constitutional Provision: VII Amendment, United States Constitution;

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Statutory Provision: Title 45, U.S.C.A., Section 56 [Limitation of Action, Federal Employers Liability Act]

> "No action shall be maintained under this act unless commenced within three years from the day the cause of action accrued.
>
> "Under this act an action may be brought in a circuit [district] court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States."

STATEMENT OF THE CASE

Adkins, 47 years old at the time of trial in 1969, had completed the fourth grade of school. He began working for Kelly's Creek as a section hand in 1944. On May 8, 1952, his crew was attempting to replace a broken rail when a large rail fell on his left leg requiring it to be amputated just below the knee. Seven months after the injury he returned to his job as a section hand where he worked until his employment was terminated on January 30, 1963.

At the time of injury in 1952, Kelly's Creek was a wholly owned subsidiary of Warners Collieries Company, which was engaged in mining operations in Kanawha County,

West Virginia, and whose coal Kelly's Creek hauled from the Warner Collieries tipples at its mines to its river tipple where the coal was dumped into barges. In 1959 Warner Collieries Company merged with North American Coal Company which took all of the Kelly's Creek stock and moved the railroad's office from Mammoth in Kanawha County, West Virginia, where both corporations were engaged in a common undertaking, to North America's location in Cleveland Ohio. Following the merger, Kelly's Creek continued to operate until surrendering its I.C.C. license in March 1964 and dissolving as a corporation in September 1964. During its operation Warner Collieries and Kelly's Creek had the same general manager; the members of the board of directors and officers were the same persons in most instances; they operated to a common purpose; and on at least one occasion the Collieries Company had advanced money to Kelly's Creek employees.

Adkins' evidence is that M. F. Wolfe, whom Adkins understood to be the general manager of Kelly's Creek, visited him in the hospital at the time of injury, and told him that if he would not bring suit against the company, he would have a lifetime job with them. Adkins testified that his section foreman told him the same thing and that an insurance man, as well as a clerk employed by Kelly's Creek, told him that if he would take the $4,500 compensation offered him by the insurance man he would always have a job with the company for the rest of his life. The evidence indicates that Adkins did receive money from the insurance man.

Kelly's Creek's evidence denied any promises or representations being made, but contended that if they were made the persons who made them had no authority to make them. Its evidence was that Wolfe was no longer a general manager when the promises were supposedly made, but that he was working for the Collieries Company as a coal consultant on a part time basis; but, that if there was an agreement between Adkins and Kelly's Creek, Adkins had waived any right to sue on it by going to work for a new employer, Warner Collieries Company.

The evidence relied on for waiver is the following:

At the time of injury in 1952 all sections hands were members of U.M.W. District 50 but were also paying dues into the Railroad Brotherhood. The train crews belonged to the Brotherhood while the miners and the tipple workers belonged to U.M.W. District 17. In 1955 some discussion arose between the General Manager of Warner Collieries and Kelly's Creek and the section hands about them being transferred into District 17. This was done sometime in November 1955, following the General Manager's written notice supposedly terminating Adkins' employment with Kelly's Creek on November 15, 1955, and upon which notice the General manager hired Adkins to work for Warner Collieries Company, effective November 16, 1955.

Although Adkins was supposed to have lost his senority standing after 1955 this is just not so as he continued to work for a time even after the mines had shut down and the miners were laid off.

In his complaint filed in November 1965, Adkins alleged in the first count, that representatives of Kelly's Creek visited him in the hospital, admitted the company's liability but admonished him not to get counsel, assuring him that Kelly's Creek would give him a lifetime job and if it did not live up to its agreement, he could always enforce his rights under the F.E.L.A. That he relied on the assurances, which obstructed him from maintaining a F.E.L.A. Action, consequently, the time of the assurances would not count as a part of the statue of limitations.

The substance of the second count alleges that the representatives of Kelly's Creek visited Adkins in the hospital and offered him a lifetime job if he would not sue for damages; that he accepted the offer and fulfilled his part of the contract until 1963 when his employment was terminated.

The answer of Kelly's Creek denies all material allegations of the complaint and also pleads limitations.

In sustaining partial summary judgment the district court did so being of the opinion that from the allegations

of the complaint the inescapable conclusions were that (1) if a contract of lifetime employment had actually been affected, Adkins' agreement to forego bringing a personal injury action was merged in to the contract, but that (2) if no such agreement had been made the F.E.L.A. cause of action would be barred by limitation as untimely as Adkins has failed to demonstrate any misrepresentation that would toll it.

Subsequently the case was tried on the contract count. The jury found a verdict for Adkins in the amount of $117,568.44.

REASONS FOR GRANTING THE WRIT

A. THE FOURTH CIRCUIT'S RULING SUSTAINING SUMMARY DISMISSAL OF THE F.E.L.A. COUNT FROM THE COMPLAINT DENIES ADKINS THE RIGHT TO TRIAL BY JURY CONTRARY TO THE CONGRESSIONAL PURPOSE OF THE ENACTMENT; CONTRARY TO PREVIOUS DECISIONS OF THIS COURT; AND, CONTRARY TO THE 7TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Several decisions of this Court recognize the right of trial by jury to be an integral part of the F.E.L.A. In *Bailey* v. *Central Vermont Railway, Inc.* 319 U. S. 350 (1943), this Court uses this language:

> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence'. * * * . It is a part and parcel of the remedy afforded railroad workers under the Employers Liability Act. * * * . To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief Congress has afforded them."

In accord with the *Bailey* case is *Schultz* v. *Pennsylvania Railroad Company,* 350 U.S. 523 (1956).

Numerous other decisions of this Court have acknowledged the Congressional intention in inacting the F.E.L.A.

to assure an injured employee thereunder the right to a jury determination. *Lavender* v. *Kuhn*, 327 U. S. 645 (1946); *Harris* v. *Pennsylvania Railroad Company*, 361 U. S. 15 (1959).

Nor have the decisions confined the right of trial by jury to questions of negligence. *Baker* v. *Texas & Pacific Railway Company*, 359 U.S. 227 (1959), involved the issue in a F.E.L.A. action as to whether the plaintiff was an employee of the defendant railroad. In that case this Court said:

> "Although we find no decision of this Court that has discussed the matter, we think it perfectly plain that the question, like that of fault or of causation under the Act, contains factual elements such as to make it one for the jury under proper instructions as to the relevant factors of law. * * * Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury."

Ringhiser v. *Chesapeake and Ohio Railway Company*, 354 U. S. 901 (1957), held the question of whether the employer knew or could have anticipated that "a car was being used for such purposes" was a jury question.

Beyond a doubt the question of whether the time limitation provided in the F.E.L.A. is tolled is a jury question.

In *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231 (1959), where the plaintiff in a F.E.L.A. action otherwise barred, alleged the defendant should be estopped to plead limitations because of representations made, this Court uses the following language:

> "We hold that it was error to dismiss this case. Despite the delay in filing suit petitioner [employee] is entitled to have his cause tried on the merits if he can prove that respondents' responsible agents, agents with some authority in the particular matter, conducted themselves in such a way that petitioner was justifiably misled into a good faith belief that

> he could begin his action at any time within seven years after it had accrued."
>
> "It is no answer to say, as respondent [employer] does, that the representations alleged were of law and not of fact and therefore could not justifiably be relied on by petitioner. Whether they could or could not depends on who made them and the circumstances in which they were made. See *Scarborough* v. *Atlantic Cost Line R. Co.*, 190 F. 2d 935 (1951). Such question cannot be decided at this stage of the proceeding."

In the *Scarborough* case the Fourth Circuit held that the issue of whether the F.E.L.A. statute of limitations was tolled by the plaintiff's reliance upon alleged representations of the railroad's claims agent, "must be decided by the jury upon proper instructions."

In *Cratsley* v. *Pittsburgh and Lake Erie Railroad Company*, 272 F. Supp. 330 (W.D. Pa. 1967), where a F.E.L.A. action was filed 11 years after the injury, and the complaint alleged defendant's estopple to plead limitations because of representations and promises of the defendant, which had denied making them, created a genuine issue of fact precluding summary judgment.

Summary dismissal of the F.E.L.A. count here was based solely on the face of the complaint and without any factual considerations whatever. It was based purely on the district court's conclusions (1) that if a contract of lifetime employment had been made the tort action was merged into the contract, and, (2) if no contract was made the tort claim would be barred "for the reason that if the making of the contract was not established by the evidence the conclusion would naturally follow that there was no misrepresentation tolling the statute of limitations." See district court and Fourth Circuit opinions, (A-2-15). The last assumption is a non sequitur, a heads I win, tails you lose, sort of proposition. Moreover, the reverse of it is that if the evidence showed a contract, the ac-

tion would not be barred. Furthermore, it is quite likely that the evidence could not be sufficient to prove a contract due to a lack of authority on the part of Kelly's Creeks' agents, an ambiguity of contract terms, no contractural intent, lack of mutuality, or even failure of consideration, but could still be enough evidence to establish misconduct of Kelly's Creek sufficient to estop it from pleading limitations; or, at least enough evidence to let the question go to the jury.

Clearly, the rulings of the lower courts are in conflict with the foregoing decisions of this Court, as well as the Fourth Circuits own decision in the *Scarborough* case. These conflicts are such as to warrant issuance of the writ sought herein.

B. THE DISTRICT COURT AND THE FOURTH CIRCUIT MISCONSTRUED THE DECISIONAL LAW OF WEST VIRGINIA IN THE CASE OF *BEALL* V. *MORGANTOWN & KINGWOOD RAILROAD COMPANY*, 118 W. VA. 289, 190 S. E. 333 (1937).

The district court held the rule of law of the *Beall* case to be that an employee who has a lifetime employment contract with a railroad waives any rights he may have under the contract by continuing to work for the railroad after it has merged or otherwise been taken over by another corporation. (A-7). The Fourth Circuit agreed. (A-11).

Although the *Beall* case does involve a situation similar to the one here the palpable mistake that both federal courts made in this case was to ignore the obvious differences between the two cases. *Beall* involved a "sale" of the contracting railroad to a new, separate and distinct operating railroad entity which after the sale, operated as it had before the sale took place as the B & O Railroad, and by all indications the selling railroad ceased to exist as an operating railroad after the sale was completed. There were no dual supervisors, directors, or officers, of the two railroads in *Beall*. Employee *Beall* was a fireman,

then an engineer. And while there is nothing in the case to show what his educational background was, it should be at least average in light of his responsibilities.

In this case, on the other hand, there was no new separate company involved but a simple paper transfer of employees from one corporation over to the other. Unlike the transaction in *Beall* the two corporations here had dual supervisors and in most instances the same directors and officers whose duties were interrelated. Adkins kept his same job. His seniority situation did not change in fact. And the only real changes that he was aware of were that he was put on the Collieries Company's payroll and his Union membership was changed. True, he did gain some increase in wages and perhaps in hospital benefits from his transfer into U.M.W. District 17, but these changes are among the other factual matters to be considered concerning the situation as it existed, and the way Adkins, who only had a fourth grade education, understood the situation to be.

The test of waiver is set out in point 1, syllabus, of the *Beall* case:

> "Where, with full knowledge of his rights, the conduct of a party to a contract is wholly inconsistent with reliance on the contract, he will be deemed to have waived his rights thereunder."

Clearly, under the undisputed facts of this case, which involves a parent corporation engaged in mining operations, and its subsidiary corporation, a railroad which hauls the parent's coal, the right of employees should not be defeated on the ground that a paper manipulation between the two corporations have settled their employment to be with *that corporation not responsible* to the employees when there are no changes in the employees duties. To permit this would mean that the giant railroads of this nation could transfer large segments of their labor forces into different corporations, change the payroll and put them into a different Union, thereby defeating their rights

as railroad workers, including those rights under F.E.L.A. Whatever the designation may be such employees would still be railroad employees.

By deciding the question of waiver contrary to the principals of law set forth in the *Beall* case, the Fourth Circuit has improperly disposed of an important state question which warrants this Courts issuance of this writ of certiorari.

C. IN CONTRAST WITH DECISIONS OF OTHER FEDERAL COURTS THE FEDERAL COURTS HERE WEIGHED AND CONSIDERED THE EVIDENCE AND IGNORED THE JURY VERDICTS IN GRANTING KELLY'S CREEK'S MOTION FOR MOTION N.O.V.

The Fourth Circuit found that the district court considered all the evidence together with all reasonable inferences most favorable to Adkins. (A-12). The districts court's opinion however, considers the inferences to the contrary. This is shown by the statements of the district court in its opinion that Adkins made no effort to obtain employment from the railroad or attempt to bring the "alleged contract" to the attention of any responsible official of the railroad until instituting his action in 1965; that the "alleged contract" relied upon was an "alleged parole agreement" between him and Wolfe, a development consultant for Warners Collieries Company, and, that other than Adkins and his wife, who testified that the promises were in fact made, the other parties who had knowledge of the alleged contract were deceased. (A-8-9)

By making these observations the district court showed clearly the skepticism which that Court had for the credibility of the evidence offered by Adkins to prove the agreement and the misgivings which the district court had for the merits of Adkins' case. Otherwise the remarks had nothing to do with the case. As matter of fact, the evidence showed the delay to be that of counsel in bringing suit and there is nothing to show that the evidence

offered by Adkins was not proper in all respects. The overall reading of the district court's opinion shows that that court simply did not believe Adkins nor his evidence. A disbelief in a plaintiff's case is not, however, enough for a trial court to sustain a verdict n.o.v.

The case went to the jury on the court's charge for it to (1) determine from the evidence whether there was a contract, and (2) even if it did determine that a contract of employment had been made, it could still find that Adkins had waived his rights under it by conducting himself in a manner not consistent with it.

The general rule is that a motion n.o.v. cannot be granted unless as a matter of law the opponent of the movant failed to make a case. *Montgomery Ward & Company* v. *Duncan*, 311 U. S. 243 (1943). And, before a trial court can set aside a jury verdict certain other principals should be considered: the evidence must be considered in light most favorable to the party against whom the motion is made and any conflict resolved in his favor and every conclusion or inference that can be legitimately drawn therefrom in his behalf also must be drawn. *Ortiz* v. *Greyhound Corp.*, 275 F. 2d 770 (4th Cir. 1960).

As the district court and the Fourth Circuit have decided the question here contrary to and in conflict with, the general rules of law applicable to a court's determination of a motion n.o.v., the writ of certorari sought herein should be issued.

CONCLUSION

For the reasons assigned petitioner, Adkins, prays that the writ of certiorari should be granted and the writ issue to review the judgment order and opinions entered in case No. 71-1457 as aforesaid.

Petitioner intends to urge each of the questions presented, even if not specially argued herein.

Respectfully submitted,

RUDOLPH L. DITRAPANO
604 Virginia Street E.
Charleston, West Virginia 25301

ROBERT M. HARVEY
1256 West Virginia Avenue
Dunbar, West Virginia 25064

APPENDIX

March 1, 1968

Re: *Ray Leonard Adkins* v. *Kelly's Creek Railroad Company*—Civil Action 3343

Gentlemen:

The complaint in this case is drawn in two "counts." The first alleges a cause of action under F.E.L.A. for an injury sustained by plaintiff on May 17, 1951, in the course of his employment with the defendant railroad. The complaint further alleges that plaintiff was dissuaded from pursuing his rights under the Act by the representations of the defendant's agents that he would be given a lifetime job. This "count" indicates that the plaintiff now seeks to recover appropriate damages for his 1951 injury, and charges that the defendant is precluded from interposition of the statute of limitations by reason of its assurances to plaintiff. The second "count" alleges the injury in May of 1951, and an oral contract between plaintiff and the defendant, acting through its authorized agents, under which the plaintiff would have lifetime employment with defendant in consideration of plaintiff's promise to refrain from pursuing legal action on his claim for injuries. Plaintiff charges that his employment was terminated on January 30, 1963, and that this constituted a breach of the contract on the part of defendant which entitles the plaintiff to a recovery of damages.

The defendant has filed a motion for summary judgment in regard to both "counts" of the complaint, contending that there is no genuine issue as to any material fact and that dismissal of the complaint should follow as a matter of law.

First, as to the alleged cause of action under F.E.L.A., there is no question that the statute of limitations can be tolled when the plaintiff has been misled by defendant's misrepresentations. See *Glus* v. *Brooklyn Eastern Terminal,* 359 U. S. 231 (1958); *Scarborough* v. *Atlantic Coast*

Line R. Co., (4th Cir.) 178 F. 2d 253; 190 F. 2d 935. However, the allegations of the complaint in the present case clearly indicate that an action for injuries under F.E.L.A. no longer exists. If, in fact, a valid employment agreement was made as alleged in the complaint then the personal injury claim, in effect, was settled or "merged" into the agreement. If, on the other hand, no such agreement was effected, the F.E.L.A. claim is barred by the three year limitation for in such event the plaintiff has failed to demonstrate any misrepresentation that would entitle him to the benefit of the *Glus* rule. Accordingly, it is my conclusion that summary dismissal of the F.E.L.A. "count" is appropriate.

The contract "count," however, is not in my opinion subject to summary disposition. An agreement similar to the one here alleged was countenanced by our Court in *Rhodes* v. *Railway Co.*, 49 W. Va. 494, 39 S.E. 209 (1901). While it is true the agreement in that case had been reduced to writing, it would appear that the principle enunciated therein should be equally applicable to a verbal agreement since such a contract does not fall within the statute of frauds. Whether the plaintiff can carry the burden of proving the alleged agreement remains to be seen, but I do feel he is entitled to a plenary trial on that issue. I also am of the opinion that he is entitled to similar evidentiary development on the question of the applicability of the principles of *Beall* v. *Morgantown & Kingwood R. Co.*, 118 W. Va. 289, 190 S. E. 333 (1937).

The motion for summary judgment will be granted in regard to the F.E.L.A. claim and denied with respect to the contract claim. Counsel may prepare an appropriate order incorporating this letter ruling by reference therein.

Civil Action
No. 3343

RAY LEONARD ADKINS,

Plaintiff,

v.

KELLY'S CREEK RAILROAD COMPANY,

a corporation,

Defendant.

MEMORANDUM OPINION

Plaintiff, Ray Leonard Adkins, sued defendant, Kelly's Creek Railroad Company, in this Court, alleging a cause of action under F.E.L.A. for an injury sustained by plaintiff on May 8, 1952, in the course of his employment with defendant railroad and, additionally, a cause of action for breach of an alleged oral contract between plaintiff and defendant wherein defendant promised to provide plaintiff with lifetime employment. A motion by defendant for summary judgment was granted as to the F.E.L.A. claim since I concluded that if the contract for lifetime employment had been effected, the cause of action under F.E.L.A. was settled or merged into the agreement, and if no contract for such lifetime employment had been made, then in such event the claim was barred by the three-year statute of limitations. The other aspect of this motion by defendant was denied as to the claim for breach of the alleged contract for lifetime employment, and the case was tried to a jury which returned a verdict for plaintiff in the amount of $117,568.44. As was to be expected, following such a verdict, defendant moved under Rule 50(b) for judgment notwithstanding the verdict or in the alternative for a new trial.

The facts are substantially as follows. Plaintiff, while employed as a section hand by Kelly's Creek Railroad Company, suffered an injury necessitating the amputation of his left leg immediately above the ankle. Following the accident and while he was still hospitalized, plaintiff contends that he was approached by F. W. Wolfe, allegedly the manager of the railroad, with an offer of lifetime employment in return for which plaintiff was to agree to relinquish his F.E.L.A. claim against the railroad. Plaintiff says he accepted the offer by returning to work and not pursuing his claim against the defendant.

Plaintiff received $4,700 plus his hospital expenses from defendant's insurance carrier and while there was testimony to the effect that he signed a release, it could not be located or produced at the trial. Plaintiff returned to work and continued to work for defendant until 1955 when he was transferred to Warner Collieries Company, the parent company of defendant. After the transfer his paychecks were drawn on Warner Collieries instead of defendant, his workday was forty-five minutes shorter, he received a higher rate of pay, and transferred his union affiliation to one providing greater welfare and medical benefits. In 1959, Warner Collieries Company merged with North American Coal Company and thereafter the Kelly's Creek properties were operated by North American. Plaintiff continued to work for Warner and North American until January 29, 1963, when the latter company ceased all operations on its Kelly's Creek properties. The instant action was subsequently commenced in November, 1965.

In its motion for judgment notwithstanding the verdict defendant contends (a) the Court erred in refusing defendant's motion for summary judgment; (b) plaintiff waived his right to enforce the alleged contract after his employment was terminated by defendant in 1955; (c) plaintiff is barred by the five-year statute of limitations; (d) the alleged promise was not intended to survive or extend beyond the termination of all business operations by the defendant; and (e) F. W. Wolfe, alleged by

plaintiff to have offered him the lifetime employment, had no authority, actual or implied, to bind defendant to such a contract. The defendant raises substantially the same issues in its motion in the alternative for a new trial, and further contends (a) the evidence is insufficient to show the making of the alleged contract; (b) the Court erred in admitting plaintiff's evidence on the amount of damages; and (c) the verdict returned by the jury was excessive and clearly appears to have been given under the influence of sympathy, passion and prejudice.

Of course, the contention that the Court erred in refusing defendant's motion for a directed verdict is inclusive of all of these basic contentions, and if any of those contentions is meritorious, the Court should grant the motion for judgment notwithstanding the verdict. Taking those contentions as a whole, three distinct issues arise on the motion for judgment notwithstanding the verdict. First of all, there is the issue of when the alleged agreement was breached. If, as plaintiff contends, he did not waive his rights when he accepted employment with Warner Collieries back in 1955, the breach did not occur until 1963 when plaintiff was discharged by North American. Conversely, if, as defendant contends, the breach occurred back in 1955 when plaintiff was transferred to Warner Collieries, he did waive his rights when he accepted employment with Warner Collieries and he is barred by the five-year statute of limitations. Next, there is the issue of whether the alleged agreement survives the termination of all business operations by defendant, and finally, there is the issue of whether F. W. Wolfe had authority, actual or implied, to bind defendant to an agreement to provide plaintiff with lifetime employment.

While my summary disposition of the F.E.L.A. "count" eliminated any federal question jurisdiction, neither party challenged jurisdiction with respect to the remaining common law "count." The record fails to clearly indicate whether or not there is diversity between the parties litigant, but in any event jurisdiction in this Court of the non-federal claim may be supported under the doctrine

of "pendent jurisdiction." *Hurn* v. *Oursler,* 289 U. S. 238; *Rumbaugh* v. *Winifrede Railroad Company,* 331 F.2d 530 (4th Cir. 1964). Regardless of the jurisdictional basis of the non-federal claim, it is the duty of this Court to apply the law of the State of West Virginia in the disposition of the defendant's motion in this case. If the jurisdictional basis is diversity of citizenship, then, of course, the *Erie* doctrine is applicable, and if jurisdiction rests upon the "pendent" theory, the law of the state is still controlling. 1 Moore's Federal Practice, Pt. 3, para. 0.305[3].

The two leading cases in West Virginia dealing with agreements for lifetime employment on facts analogous to the case at hand are *Rhoades* v. *Chesapeake & O. Ry. Co.,* 49 W. Va. 494, 39 S.E. 209 (1901), and *Beall* v. *Morgantown & Kingwood* R.R. Co., 118 W. Va. 289, 190 S.E. 333 (1937). In the *Rhoades* case the injured plaintiff signed a release of defendant, his employer, in consideration for which he received a written promise of lifetime employment so long as his work was satisfactory to his foreman. Subsequently, the plaintiff was discharged and sued his employer on the contract. The Supreme Court of West Virginia held "there is no lack of certainty or mutuality in the agreement, for all its terms are settled and, by releasing his claim for damages, the employe has paid in advance for the option to do such work for his employer as he is able to do, and he cannot be *discharged without cause.*" The *Rhoades* case thus established the validity and enforceability of such lifetime contracts in West Virginia. Subsequently, however, the *Beall* decision placed some definitive restrictions on such lifetime employment agreements.

In the *Beall* case plaintiff, after a disabling injury, agreed to and did forego his right to proceed against defendant, *Morgantown & Kingwood Railroad Co.,* in return for a promise of lifetime employment. Subsequently, the stock of defendant was sold to the Baltimore & Ohio Railroad Company and the B & O took over the operations of defendant. Plaintiff continued in the

same position with the B & O which he had held with defendant without any change in seniority rights or otherwise, but after the merger he was, of course, paid by the B & O. Some twelve years after the merger he was furloughed by the B & O. Plaintiff sought re-employment with defendant and then with the B & O and, failing in those efforts, sued defendant for breach of the contract for lifetime employment. The West Virginia Supreme Court stated at 335:

> "In 1920, the plaintiff made no protest against being transferred to the payroll of the Baltimore & Ohio Railroad Company. For twelve years, he continued in that company's employ, and, within that period, made no demand on the Morgantown & Kingwood Railroad Company that it furnish him employment under his contract, nor did he tender himself ready to work for the last named company until after he was furloughed by the Baltimore & Ohio Railroad Company. The obvious fact is that within the period of his twelve years' employment by the Baltimore & Ohio Railroad Company he was not in position to tender his services to the Morgantown & Kingwood Railroad Company unless he was desirous of severing relations with his latter employer and looking solely to the former. This, he did not seem willing to do. His long time voluntary service for his *new employer must be taken as a waiver* by him of his rights under the contract of employment with the defendant."

The *Beall* case *stated simply* is a decision by the highest court of our state that an employee with a lifetime employment contract from a railroad waives any rights he may have under the contract by continuing to work for the railroad after it has merged or otherwise been taken over by another corporation. This is the law in West Virginia, and as such it is binding upon this Court, and the remaining question is whether the *Beall* decision is applicable to the facts of the instant case.

A review of the evidence indicates that the facts in the present case are not only parallel to those in the *Beall* case, but are considerably stronger and more persuasive from the standpoint of the defendant railroad. Following his injury, Adkins returned to work for the defendant in 1952 and his employment continued until November 15, 1955. A written termination statement was given to Mr. Adkins on that date which he signed acknowledging receipt thereof. Thereafter Adkins was employed by Warner Collieries Company under terms and conditions which differed materially from his old employment with Kelly's Creek Railroad Company. By virtue of his employment with Warner, Adkins received a substantial increase in pay and a reduction in his hours of work. Incident to his new employment he transferred from a local union in District 50 of the United Mine Workers to a local union in District 17 of the U.M.W. At the time he transferred his union affiliation, Adkins was aware of the fact that he was losing his seniority with the Railroad Brotherhood as well as his rights under the Railroad Retirement Act. Additionally, his name was placed at the bottom of the seniority list of District 17 of the U.M.W. On the other hand, in addition to his increase in pay and reduction in working hours, Adkins was given substantial welfare and medical benefits as the result of the transfer of his union affiliation.

In 1959, Warner merged with North American Coal Company and Adkins continued to work until January 29, 1963, when the latter company ceased its operations on the Kelly's Creek properties. The Kelly's Creek Railroad Company continued to operate for a short time after the mine closure and only employees of the railroad continued to work during this period. No employees of North American, including Adkins, performed any work on the railroad during this final phase of its operation.

Following the termination of his job with North American, Adkins made no effort to obtain employment on the railroad nor did he attempt to bring his alleged contract to the attention of any responsible official of North

American until the present action was instituted late in the year 1965. Unlike the *Beall* case where the employment contract had been reduced to writing, Adkins relies entirely upon an alleged parole agreement between him and F. W. Wolfe, a development consultant for Warner Collieries Company. Based upon Adkins' testimony, the only parties other than Adkins and his wife who had direct knowledge of the alleged contract were Wolfe and one Josephus Johnson, both of whom were deceased some years prior to the institution of this law suit.

Upon these facts, under the law of West Virginia as set forth in the *Beall* decision, the inescapable conclusion is that as a matter of law the plaintiff, Adkins, waived his rights under the alleged contract of lifetime employment and should not be permitted to recover in this action for the breach thereof. Under these circumstances, the defendant's motion to set aside the verdict and judgment entered herein on February 15, 1969, and enter judgment not withstanding said judgment in accordance with defendant's motion for a directed verdict will be granted.

With respect to the alternative motion for a new trial, aside from my action with with respect to the motion for judgment n.o.v., I can perceive nothing that would justify or require a new trial in this case and, accordingly, the alternative motion for a new trial will be denied.

Consel may prepare an appropriate order reflecting my action on these motions and incorporating this memorandum opinion by reference therein.

United States District Judge

Dated December 3, 1970

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 71-1457

RAY LEONARD ADKINS,
Appellant,

versus

KELLY'S CREEK RAILROAD COMPANY,
a corporation,
Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. John A. Field, Jr., District Judge.

(Argued November 7, 1971. Decided April 5, 1972.)

Before BOREMAN, Senior Circuit Judge, and WINTER and RUSSELL, Circuit Judges.

Per Curiam:

Appellant Adkins, while employed in 1952 as a section hand by Kelly's Creek Railroad Company (hereafter "the railroad" or "Kelly's Creek"), sustained an injury necessitating the amputation of his left foot and ankle.

At trial, Adkins stated that he returned to work when he had sufficiently recovered from his injury and, pursuant to an oral agreement with the railroad, he did not bring an action under the F.E.L.A.[1] against Kelly's Creek in return for $4,700 plus hospital expenses from the railroad's insurance carrier and a promise by various railroad officials of lifetime employment[2] with Kelly's Creek.

[1]Clearly, Adkins was injured while working for Kelly's Creek and was entitled to bring an action against that railroad pursuant to the provisions of the Federal Employers' Liability Act. 45 U.S.C. § 51.

[2]Appellant maintained, in his complaint, that a Kelly's Creek official had assured him that he would *always* be able to institute his F.E.L.A. suit should the railroad violate the employment agreement.

Appellant worked for Kelly's Creek until 1955 when he was transferred to the payroll of the Warner Collieries Company (hereafter "Warner"), the closely related parent corporation of Kelly's Creek,[3] changed his union membership and thereafter enjoyed a shorter workday, higher pay, and other benefits. Warner was merged into North American Coal Company in 1959; Adkins continued to work for Warner and North American until 1963 when the latter discontinued operations in the area and Adkins' employment was terminated. This action was commenced in November 1965.

In his complaint Adkins alleged two causes of action: the first, under the F.E.L.A., based on the injury sustained by him in 1952; and the second, based on the termination of his employment in 1963, for breach of the claimed oral agreement between himself and Kelly's Creek with respect to his lifetime employment.

The district court granted Kelly's Creek's pretrial motion for summary judgment with respect to the F.E.L.A. cause of action. The railroad had contended that this claim was barred by the applicable three-year statute of limitations. Adkins had argued that the statute of limitations had been tolled when the railroad's agent had misrepresented that appellant would *always* be able to bring his claim under the F.E.L.A. if the railroad were to breach the employment contract. The district court found two assumptions to be tenable, both leading to the inescapable conclusion that Adkins' F.E.L.A. claim could not be maintained. First, if a contract for lifetime employment had actually been effected, Adkins' agreement to forego bringing a personal injury action was merged into the contract.[4] Second, if no such agreement had been made, the F.E.L.A. cause of action was barred by limitations as untimely for the reason that if the making of the contract were not

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[3]Kelly's Creek was a wholly owned subsidiary of Warner.

[4]Appellant's remedy, then, would be an action on the contract.

established by the evidence the conclusion would naturally follow that there was no misrepresentation tolling the statute of limitations.

Adkins' breach of contract claim was tried by a jury which returned a substantial verdict in his favor. Implicit in this verdict was a finding of a valid and binding oral contract between Adkins and Kelly's Creek and a breach of the lifetime employment provision of that contract in 1963. Subsequently the trial court, relying on *Beall* v. *Morgantown & Kingwood Railroad Company,* 118 W. Va. 289, 190 S.E. 333 (1937), found that Adkins had waived his rights under the contract when he accepted employment by a new employer, Warner, in 1955 and granted the motion of Kelly's Creek for judgment notwithstanding the verdict.

On appeal, appellant contends that the district court erroneously ruled that he had waived his contractual rights and improperly "weighed"[5] the evidence, in granting the railroad's motion for judgment *n.o.v.*[6] Also, Adkins asserts that the district court erred in sustaining Kelly's Creek's motion for summary judgment on the F.E.L.A. claim because it was for the jury to determine whether or not the time limitation provided by the F.E.L.A. on the institution of his action was tolled by the railroad's alleged misrepresentation.

It is clear that the district court did not "weigh" the evidence but, quite properly, considered all the evidence together with all reasonable inferences most favorable to

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[5]Appellant refers to the district court's mention in its opinion of the fact that appellant made no effort to secure enforcement of the employment agreement until nearly two years after his discharge and the fact that all persons supposedly cognizant of the agreement, other than Adkins and his wife, were deceased. These facts seem to have been recited by the district court merely as part of its development of the circumstances in this case and without any particular reliance thereon.

[6]The district judge denied Kelly's Creek's alternative motion for a new trial.

Adkins. We reach the conclusion that the trial court correctly held that *Beall* v. *Morgantown & Kingwood Railroad Company, supra,* was controlling and that Adkins waived his rights under the lifetime employment agreement with Kelly's Creek by accepting employment with another corporation. Accordingly, we affirm with respect to this assignment of error on the basis of the district court's opinion. *Adkins* v. *Kelly's Creek Railroad Company,* F. Supp. ——— (S.D. W. Va. 1971).

Upon consideration of the record, the briefs and oral arguments we find no merit in appellant's contention that the trial court erred in dismissing his action for damages for personal injuries under the F.E.L.A. and in other assignments of error.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 71-1457

RAY LEONARD ADKINS,
Appellant,

versus

KELLY'S CREEK RAILROAD COMPANY,
a corporation,

Appellee.

ORDER DENYING PETITION FOR REHEARING

Upon consideration of the petition for rehearing filed herein by the appellant on April 19, 1972, with the concurrence of Judge Winter and Judge Russell,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, denied.

s/Herbert S. Boreman
Senior United States Circuit Judge